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In The

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-1856

HUMBOLDT PLACER MINING COMPANY,

Petitioner,

v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
Petition for Writ of Certiorari. . .	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules	2
Statement of the Case	4
Reasons for Granting the Writ . . .	6
Argument	13
Conclusion	26
APPENDIX	
Order denying rehearing 3/28/77	A-1
Opinion of United States Court of Appeals for the Ninth Circuit. Case No. 74-2763, 249 F2d 622, January 6, 1977	A-2
Summary Judgment, U.S. District Court for the Eastern District of California Civil S-2755 lodged Aug. 28, 1973, entered June 12, 1974	A-9
Interior Board of Land Appeals Decision December 20, 1972, 8 IBLA 407, IBLA 70-205	A-10
Decision of Francis A. Patton, Acting Chief, Office of Appeals and Hearings, June 9, 1970 . . .	A-39

APPENDIX (continued)

	Page
Decision of Hearing Examiner, Rudolph M. Steiner, March 6, 1969	A-64
Hearing Examiner's Rulings on Proposed Findings, March 6, 1969	A-91
Requested Findings and Findings Adopted	A-96
Administrative Procedure Act, 5 USC Sec. 557, relating to agency findings	A-130
Common Varieties Act, 30 USC Sec. 611	A-132
Rule 56, Federal Rules of Civil Procedure - Summary Judgment . .	A-133

AUTHORITIES CITED

Cases

Beane v. Richardson, 457 F2d 758 (CA 9).	9
Best v. Humboldt, 293 F2d 555 (CA 9, 1961) reversed by Best v. Humboldt, 371 U.S. 334 (1963)	4
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, reversing 432 F2d 1307 (6th Cir) and 309 F. Supp. 1189 (W. D. Tenn)	12
Cream Wipt Food Products Co. v. Federal Security Administrator, 187 F2d 789 (CA 3, 1951)	11

AUTHORITIES

Cases

	Page
Dredge Corp. v. Penny, 338 F2d 456 (CA 9).....	9
Heber Valley Milk Company v. Butz, 503 F2d 96,97 (CA 10 1974).....	7,9
Henrikson v. Udall, 350 F2d 949 (CA9)...	9
Hill v. Morton, 525 F2d 327 (CA 10, 1975)	8,9
Layman v. Ellis, 52 L.D. 714 (1929).....	24
Litton Dental Products, Etc. v. N.L.R.B., 543 F2d 1085, 1087 (CA 4,1976)	11
Mueller Brass Co. v. N.L.R.B., 544 F2d 815, (CA 5, 1977).....	11
Multiple Use, Inc. v. Rodgers C.B. Morton, 504 F2d 448 (1974).....	10,12
Nickol v. United States, 501 F2d 1389 (CA 10, 1974).....	7,9,10,12
N.L.R.B. v. Mueller Brass Co., 509 F2d 704, 707 (CA 5, 1975).....	12
N.L.R.B. v. O.A. Fuller Super Markets, Inc., 374 F2d 197, 200 (CA 5, 1967).....	12
Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F2d 559, 560, cert den. 59 S.Ct. 72	14

Cases

	Page
Todaro v. Pederson, 205 F Supp 612 (N.D. Ohio 1961), aff'd 305 F2d 377 (CA 6).....	9
U.S. v. Heirs of Stack, A 28157 (U.S. Dept. of Interior 1960).....	13
Universal Camera Corp. v. NLRB, 340 U.S. 474 at 484, 488, 490.....	9,10,11,13
White v. Udall, 404 F2d 334 (CA 9).....	9

Statutes and Regulations

Administrative Procedure Act, 5 USC 706	2,3,6,10,13
Fed. R. Civ. P. Rule 56.....	10
United States Department of the Interior, August 1, 1955, Chapter 5.1 Mineral Character Determinations, Part 5 Investigations and Reports, Volume VI Minerals	23

Publications and Treatises

Congressional Record Feb. 19, 1974 Senate, S1911, 1912.....	14,15,16
Senate Doc. N. 248, 79th Cong. 2d Sess. 214, 280 (1946).....	13
6 Moore's Federal Practice para. 56.17(3) at 2472-73 (1974).....	9

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The petitioner, Humboldt Placer Mining Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 6, 1977.

OPINION BELOW

The opinion of the Court of Appeals, reported at 549 F2d 622, appears in the Appendix A-2. The District Court for the Eastern District of California rendered no opinion. The Court dismissed review of administrative action by summary judgment.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 6, 1977. A timely petition for rehearing en banc was denied on March 28, 1977. This petition for certiorari was filed within 90 days after that date.

This Court's jurisdiction is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

(1) Whether the district court should have entered summary judgment without an opinion stating the basis for its judgment on judicial review of administrative action as to whether sufficient evidence did or did not exist to support the agency decision, essential for appellate review.

(2) Whether the whole record, including agency findings of fact in favor of mining claimant, should have been scrutinized by the district court and substantiality of evidence judged by whatever in the record fairly detracts from evidence claimed to support agency action.

STATUTES AND RULES

Administrative Procedure Act, 5 USC 706.

"Sec. 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory

provisions, and determine the meaning or applicability of the terms of an agency action.

The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed, and

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(b) contrary to constitutional right, power, privilege, or immunity;

(c) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(d) without observance of procedure required by law

(e) unsupported by subtantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393."

STATEMENT OF THE CASE

Humboldt Placer Mining Company organized in 1896, was the owner of the thirteen contested placer mining claims in Trinity County, California, for over 70 years.

The United States took possession of the claims by Writ of Possession in 1957, for the purpose of constructing Trinity Dam and Reservoir.

In 1960, the Department of the Interior through the Bureau of Land Management, filed a complaint to contest validity of the claims in Sacramento 10-747.

The United States Court of Appeals enjoined prosecution of the contest, Best v. Humboldt, 293 F2d 553 (CA 9, 1961). The Supreme Court reversed, 371 U.S. 334 (1963).

In 1966, the Bureau filed a Second Amended Complaint in Contest 10-747. The charge:

> "a) There is not disclosed within the boundaries of the mining claims mineral material of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery."

Other charges were made which are not at issue here. There is no dispute that the claims are mineral in character.

The contest was tried in November, 1967 and January, 1968. In June, 1970, the Hearing Examiner[1] held the claims null and void. He ruled upon each of Humboldt's requested findings of fact. He adopted 37 specific findings of fact favorable to Humboldt.[2] He denied the remainder of Humboldt's requested findings.[3]

---

1 The United States Civil Service Commission has changed the title "Hearing Examiner" to "Administrative Law Judge"... 27 F.R. 16787, Aug. 17, 1972.

2 Findings adopted were Nos. 1,5,6,7,10,12,13, 14,17,19,23,25,30,49,51,53,58,65,66,67,68,70, 71,76,79,81,83,86,87,88,90,92,93,96,98,100, 101. A-91

3 Findings rejected were Nos. 2,3,4,8,9,11,15 16, 18,20,21,22,24,26,27,28,29,31,32,33,34, 35,36, 37,38,39,40,41,42,43,44,45,46,47,48, 50,54,55, 56,57,59,60,61,62,63,64,69,72,73, 74,75,77,78, 80,82,84,85,89,91,94,95,97,99, 102,103,104,105, 106,107,108. A-91

NOTE: There were two requested findings designated as No. 73, both rejected. We have labeled the second No. 73(a).

The Interior Board of Land Appeals adopted as its own the Examiner's rulings on each of the proposed findings of fact submitted by Humboldt. It affirmed the Hearing Examiner's decision December 1972.

When Humboldt sought judicial review, the district court was called upon to examine the facts in the administrative record and determine under 5 USC Sec. 706 (2)(E) whether the administrative ruling was or was not supported by substantial evidence.

On June 12, 1974, the United States District Court for the Eastern District of California entered summary judgment for the Secretary in Civil No. S-2755. The court made no discussion of the case in any opinion. A-9.

The district court did not make any finding of facts or express its opinion as to what it considered to be substantial evidence supporting the agency's determination. Thus, there was no basis for appellate review of the district court's decision by the Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of other courts of appeals as to the proper interpretation of 5 USC Sec. 706 governing scope of judicial review of agency action.

The tenth circuit has ruled that "where the determination under 5 U.S.C.

Sec. 706(2)(E), and the issue of whether or not the determination is 'unsupported by substantial evidence' and where this is 'substantial controversy' as to the 'material facts', the district court is precluded from entering a Fed. R. Civ. P. 56 type of 'summary judgment'" Nickol v. United States, 501 F2d 1389 (1974) (upheld on petition for rehearing en banc).

In Heber Valley Milk Company v. Butz, 503 F2d 96, 97 (10th Cir. 1974), the Honorable Thomas C. Clark, Associate Justice Retired, sat by designation with Hill and McWilliams, Circuit Judges. The court said:

> "In Nickol, we held that summary judgment is inappropriate in a judicial review under the Administrative Procedure Act of 1946 of an order and decision of an administrative agency when the issue to be decided is whether the administrative order is supported by substantial evidence, and there is substantial controversy as to the material facts. We indicated in Nickol that it is the duty of the trial court to examine the record as made before the administrative agency, and then to 'find', and to identify, the 'facts' which it deems to be supportive of the agency's order, if such be the trial court's resolution of the matter. The trial judge in Nickol in his judgment and order stated that he had examined the record as made before the administrative agency and that he had 'concluded' that there was evidence to support the agency's decision. But in Nickol we held that such was not enough, and

that the trial court must itself make 'a finding of fact or facts as to what is the substantial evidence which supports the agency determination...(and that)(t)he appellate court cannot properly review the district court's action without such findings."

In Hill v. Morton, 525 F2d 327 (10th Cir. 1975), the court said:

"In a two-sentence 'Judgment' the district court indicated 'consideration' of the briefs filed by the parties and the administrative record, concluded that the action of the Secretary was arbitrary and capricious and ordered the Secretary to pay plaintiff's claim in full. The government now appeals."

* * * *

"Here, the district court concluded only that the agency action was arbitrary and capricious, but offered neither an explanation of the manner in which the conclusion was reached nor a statement of which facts in the administrative record, or the absence thereof, were relied on in reaching its conclusion.

With basis for the district court's disposition of the matter obscure, proper appellate practice is precluded. Therefore, the judgment appealed from must be vacated and

the matter remanded for further proceedings consistent with the principles announced in Nickol and Heber Valley."

The decision here of the Court of Appeals for the Ninth Circuit affirming the district court's summary judgment in a case for judicial review, conflicts with Nickol, Heber Valley and Hill above.

The Nickol court recognized conflict with decisions of the Court of Appeals for the Ninth Circuit and said, 501 F2d 1389, p. 1390:

"One court has characterized a 'judicial determination of whether a finding of fact (in an administrative proceeding) is supported by substantial evidence' as 'only a question of law' and therefore 'subject to disposition by summary judgment'. Dredge Corp. v. Penny, 338 F2d 456 (9th Cir.). See also Beane v. Richardson, 457 F2d 758 (9th Cir.); White v. Udall, 404 F2d 334 (9th Cir.); Henrikson v. Udall, 350 F2d 949 (9th Cir.); Todaro v. Pederson, 205 F.Supp. 612 (N.D. Ohio 1961), aff'd 305 F2d 377 (6th Cir.); 6 Moore's Federal Practice p. 56.17(3) at 2472-73 (1974).

"The very purpose however of such judicial review of agency action is to examine the facts in the record. Universal Camera Corp. v. NLRB, 340 U.S. 474 at 484. Thus, it would

seem that the prerequisites for a summary judgment under Fed. R. Civ. P. 56 are absent in a review of the administrative record under the circumstances before us." 501 F2d at 1390.

* * * *

"...Thus, we hold that where the determination under 5 U.S.C. Sec. 706(2)(E), and the issue of whether or not the determination is 'unsupported by substantial evidence', and where there is 'substantial controversy' as to the 'material facts', the district court is precluded from entering a Fed. R. Civ. P. 56 type of 'summary judgment'."

The Court of Appeals for the Ninth Circuit said:

> "...a bald conclusion by the trial judge (that sufficient evidence does or does not exist to support the Secretary's decision that there had or had not been a sufficient discovery) is of no aid to this Court in making its own decision that such sufficient evidence exists, and that the district judge relied upon it." Multiple Use, Inc. v. Rodgers C. B. Morton, 504 F2d 448 (1974).

The Supreme Court said in Universal Camera that a reviewing court should set aside an agency decision when it cannot

find that the evidence supporting that decision is substantial, when viewed in the light of the record in its entirety, including the evidence opposed to the agency's view. 340 U.S. at 488. The Supreme Court (Mr. Justice Frankfurter) stressed that reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. p. 490.

The Third Circuit followed Universal Camera and exercised "the conventional judicial function" and concluded that the finding of the Federal Security Administrator establishing a standard of identity for salad dressing was not supported by substantial evidence when the record was considered as a whole. Cream Wipt Food Products Co. v. Federal Security Administrator, 187 F2d 789 (1951).

The Fourth Circuit followed Universal Camera in Litton Dental Products, Etc. v. N.L.R.B., 543 F2d 1085, 1087 (Nov. 3, 1976). It concluded that the Board's decision and order were entirely lacking in the substantial support in the evidence that is indispensable to Board action.

The Fifth Circuit discussed the appropriate standard of review in Mueller Brass Co. v. N.L.R.B., 544 F2d 815 (1977) and noted that if, after a full review of the record the court was unable to conclude that the evidence supporting the Board's determinations is substantial, it should deny enforcement.

(Citing N.L.R.B. v. Mueller Brass Co., 509 F2d 704, 707 (5th Cir 1975; N.L.R.B. v. O.A. Fuller Super Markets, Inc., 374 F2d 197, 200 (5th Cir. 1967). The Court reversed the Board's decision as not supported by substantial evidence. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, the Supreme Court reversed the Sixth Circuit's decision, which affirmed a district court's summary judgment in favor of the Secretary of Transportation's administrative determination, 309 F. Supp. 1189 (W.D. Tenn) 432 F2d 1307 (6th Cir). The Court remanded the case to the district court for "plenary review" of the administrative decision, allowing the court in its discretion, to remand the cause to the appropriate agency and official for further proceedings if necessary.

The Secretary said at page 13 of his brief to the Court of Appeals for the Ninth Circuit:

> "We cannot and do not, dispute the fact that the district court did not indicate the evidence upon which it relied in concluding that the Secretary was entitled to judgment as a matter of law... and as such, is technically in conflict with this Court's decision in Multiple Use, Inc. v. Morton, 504 F2d 448 (1974) and Nickol v. United States, et al, 501 F2d 1389 (CA 10, 1974)."

While the Supreme Court expressed reluctance to intervene in Court of Appeals decisions as to whether on the

record as a whole there is substantial evidence to support agency findings, it will do so when the standard appears to have been misapprehended or misapplied. 340 U.S. 474 at 490-491. Universal Camera Corp.

ARGUMENT

The Administrative Procedure Act (5 USC Sec. 706) provides for scope of review: "The reviewing court shall" determine whether agency action is "unsupported by substantial evidence" (subsection 3) and "the court shall review the whole record, or such portions thereof as may be cited by any party".

The Senate and House committees explained: "The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." Senate Doc. No. 248, 79th Cong. 2d Sess. 214, 280 (1946).

The Supreme Court made clear in Universal Camera that it takes literally both the words of the statute and the words of the committee reports (340 U.S. 474). The Administrative Procedure Act applies to contests conducted by the Department of the Interior. U.S. v. Heirs of Stack, A-28157 (1960).

Senator Hruska, of the Senate Judiciary Committee, former Chairman of the Committee on Administrative Practice and Procedure, made clear that Congress intended that the courts should review

administrative decisions critically. He said in the February 19, 1974 Congressional Record - Senate S 1911, 1912, that

> "The way the Administrative Procedure Act is meant to be carried out, the administrative law judges are expected to make specific findings as to the evidentiary facts in each case they hear and to frame their ultimate conclusions accordingly. If the case is brought up for judicial review, the reviewing court is not intended to dispose of the case merely by looking for some evidence in the record to support the decision below. The reviewing court should consider whether or not each of the rulings on evidentiary fact is supported by substantial evidence. The courts should not adopt uncritically findings of ultimate fact made below simply because they are labeled 'findings', when they are really conclusions.
>
> The reason why it is essential for the judge who hears the evidence to make specific findings of evidentiary fact was pointed out in Saginaw Broadcasting Co. against the Federal Communications Commission. Judge Stephens came right out with the statement that —
>
> The requirement of findings [illegible] far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered to facts and law. This is fully as important in respect to commissions as it is in respect of courts.

> "When the trial judge bases his conclusions upon specific evidentiary findings, these furnish to a reviewing court the foundation upon which to base an intelligent review of the decision. And the reviewing court should not shrink from the sometimes laborious task of examining the record to evaluate the findings made below. The Administrative Procedure Act, section 706 of title 5 of the United States Code, makes it the duty of the reviewing court to review the whole record, or such portions thereof as may be cited by any party, and to take due account of the rule of prejudicial error.
>
> If the reviewing court will take the trouble to make the critical examination of the administrative record which Congress intended when writing the Administrative Procedure Act, the court should be able to detect instances where bureaucratic policy has been allowed to override the facts which support the citizen's rights. Citizens must look to the courts to protect their constitutional rights and give them meaning. Unless the courts will stand out against instances of bureaucratic injustice, the Constitution becomes only a scrap of paper.
>
> Our form of government must necessarily make use of administrative agencies, and the course of history has shown many times and in many countries that the inevitable tendency of agencies is to reach out for increasing power, to expand the scope

of their authority and the number of their personnel until what President Franklin Roosevelt called the fourth branch of government becomes truly a bureaucracy. And, more recently the Senator from Arizona, Senator Goldwater, expressed similar concern about the bureaucracies. Power alters the perspective of the persons who wield it, and particularly where agencies administer large areas of public resources, there is a tendency to create and enlarge a Federal empire which is inside the 50 States, but really independent of them.

The temptation to consolidate that empire by dispossessing citizens of property rights lawfully acquired under acts of Congress is a strong one. To a zealous bureaucrat the project may look a righteous crusade, while the citizen screams 'Confiscation'. The task of preserving our kind of country, one where a citizen's constitutional rights are a reality, so that it will not turn into a bureaucracy where those rights have no meaning, calls for the courts to check and correct administrative abuse of power."

Review of the whole record would include contradictory findings of the Board. It would include contradictory evidence. All evidence which weakens or indisputably destroys the bald conclusion that the contested claims offered no prospect of being developed into a paying mine at the time they were taken by writ of possession in 1957 must be considered.

Contradictory agency findings indisputably destroy bald conclusions to the contrary. For example, the agency found that the gold content of the Weaverville formation averaged .276 cents per cubic yard. Four slope wash samples averaged out 1.863 cents per cubic yard. The average value of nine gully samples was 2.56 cents per cubic yard. The average value of thirteen samples of recent stream gravels was .872 cents per cubic yard.

Yet the agency also found that samples from the Jackson claim ranged from a low of 31.2 cents to 48.2 cents per cubic yard in gold and on the Furnell claim the samples ranged from 16.2 cents to 101.0 cents per cubic yard in gold. Agency finding No. 66. A-116, A-117.

The agency found that "sand and gravel on the claims is a source of concrete aggregate." Finding No. 6 A-97. In its opinion, the Board concluded that the gravel was "too dirty and too soft to make concrete aggregate." 8 IBLA 411, A-16.

In computing the low lithologic averages, agency engineers took into account low sample values on surrounding claims which were no part of the contested ground, e.g., from Tannery No. 3, Exhibit K, Tr 91, 98; from the Mistake, Potter, Curless, and Dyke, Summary of Samples S, Tr 144.

And in computing the low lithologic averages, the Bureau of Land Management engineers did not take into account the

high values in such claims. For example, they ignored the values reported by Mr. Frenzell, mining engineer for the Bureau of Reclamation, 1955, Exhibit E p. 36, Tr 339. Mr. Frenzell concluded "That a discovery of mineral has been found upon the north-half southeast quarter, southwest quarter, section 7, township 34 North, range 8 west, which would warrant a prudent man to spend time and money for the development of the claim." See Exhibit B for extent of lithologic units.

Samples for gold were taken from the contested claims:

Furnell Placer Claim: The Board found that nine samples ranged from 16 cents to $1.01 per cubic yard. The arithmetic average was 45.76 cents per cubic yard. Finding No. 66. A-116 to A-117.

Jackson Placer Claim: The Board found that eleven samples ranged from 22 cents to 48 cents per cubic yard. Finding No. 58. A-112.

Cademartori Placer Claim: The Board found three samples which averaged 7.08 cents per cubic yard. Agency finding No. 68. A-117 to A-118.

Tannery No. 2 Placer Claim: Fourteen samples taken on this claim, ranged from 12 cents to 37 cents per cubic yard with arithmetic average of 22.05 cents per cubic yard, Ex. F, 10,11, 19,33. Requested Finding No. 57, A-111.

Enough Placer Claim: Evans, Harris, Erich and Middleton took eight samples ranging from seventeen cents to ninety cents per cubic yard with arithmetic average of 39.66 cents per cubic yard. Ex M. Requested Finding No. 61, A-114.

Lewis Placer Claim: Evans, Harris, Middleton and Erich took one sample which assayed 14.48 cents per cubic yard in gold. Ex N p. 9; Ex B; Tr 120. Requested Finding No. 62. A-115.

Last Chance Placer Claim: Seven samples were taken by York, Johnson and Little for Humboldt. They ranged from 22 cents a yard to $12.80 per yard. The arithmetic average was $4.68 per cubic yard. Ex 8, 10, 11, Requested Finding No. 59. A-113.

Tannery Placer Claim: Six samples taken by Hubbard, Yost and Gibson for Humboldt ranged from 12 cents to $4.31 per cubic yard. The arithmetic average was $1.21 per cubic yard. Ex 8, 10, 11, Requested Finding No. 60. A-113 to A-114.

Humboldt Placer Claim: Two samples taken by Cumley and Gibson averaged $2.04 per cubic yard. Ex 24,16, Requested Finding No. 63. A-115.

Covelo Placer Claim: Two samples taken by Gibson averaged $8.28 per cubic yard. Ex 16, IV, Requested Finding No. 64.

Faurell Placer Claim: We have not found any evidence of the Government's

having examined this claim. The agency did not establish a prima facie case as to this claim.

White Placer Claim: Three samples were taken by Evans and Middleton, which were reported to be below one cent per yard. Finding No. 65. We question the validity of the samples taken on this claim as well as on the other claims where low values were reported. Agency Finding 65. A-116.

Ukiah Placer Claim: Two samples taken by Evans and Erich averaged 4.5 cents per cubic yard. Agency Finding 67.

Mr. Middleton, for the agency, testified costs of mining gold at the La Grange Mine were as low as three or four cents per yard. (Tr 332). The LaGrange Mine was shut down in 1942 by WBP Order L 208.

John D. Hubbard, mining engineer for Humboldt, said in 1952 that "A very conservative cost estimate of operations would be seven cents per yard," for hydraulic mining. Water was available in 1952. (Ex 10,)

Therefore, the sample values found above seven cents per yard could have been mined profitably in 1954 prior to taking in 1957.

Water was available to Humboldt for hydraulic mining prior to the taking and

writ of possession in 1957. Ex 10, Tr 784. Mr. Evans, engineer for the Bureau of Land Management, testified in 1967 that the Humboldt placers were a large, low grade potential for profit, where there are actually millions of cubic yards. "Prior to the time the lake was put in--this was really important--there was water available." Tr 265.

Mr. Evans said at the present time (eleven years after the taking) a prudent man would not mine the ground for gold, Tr 180. He did not say a prudent man would not develop the ground for gold. Mr. Evans agrees that the claims may be regarded as worthy of investigation for gold by capitalists interested in dredging and hydraulic mining. Tr 208. He did not question that large bodies of lower grade gold-bearing gravel remain to be mined. Tr 206. He agrees that the outlook for future placer gold mining in the area is good. Tr 207. Mr. Evans testified that the Weaverville alluvials present a large low-grade gold potential, millions of cubic yards. Tr 265.

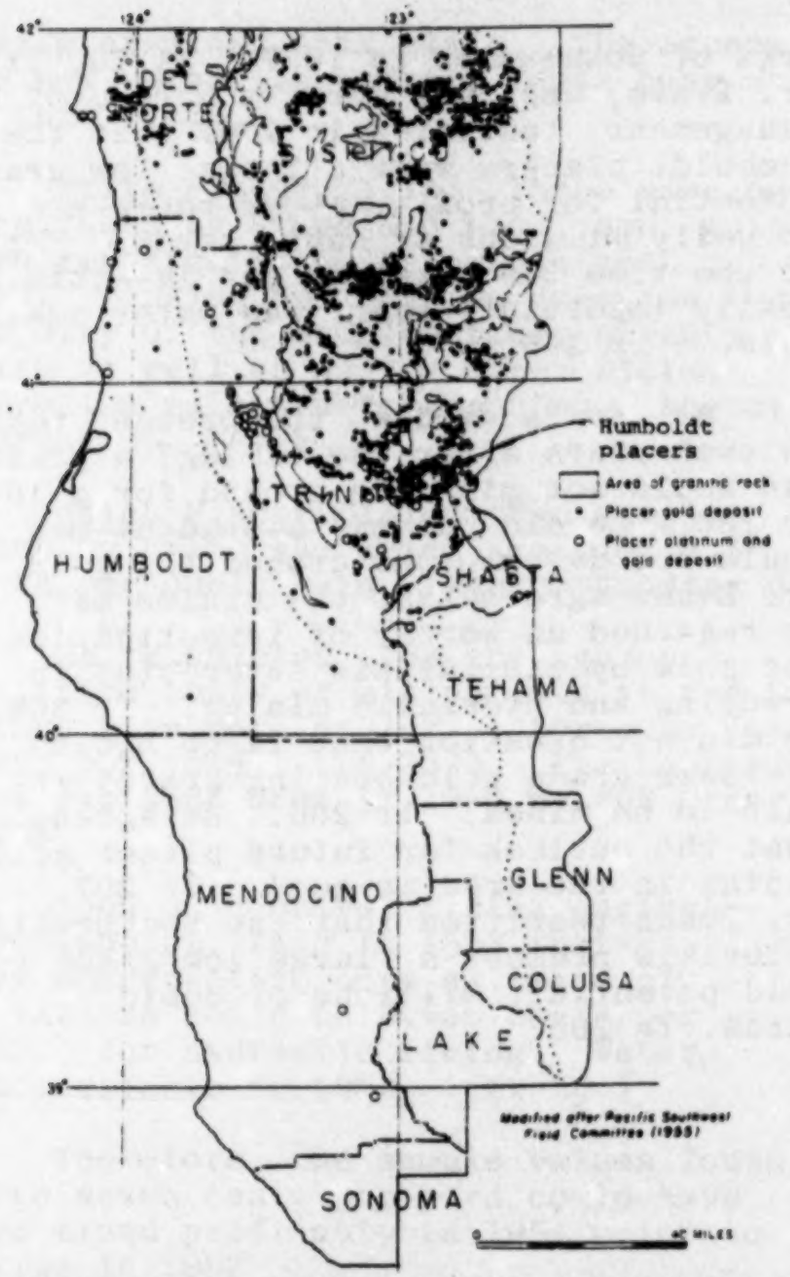

Figure 9. Map of northwestern California showing location of placer deposits of gold and platinum.

Geologic Reconnaissance of the Northern Coast Ranges and Klamath Mountains, California. California Division of Mines Bulletin 179 1960

Humboldt's gravel deposits met all of the requirements of discovery under the criteria recognized by the United States Department of the Interior August 1, 1955, Chapter 5.1 Mineral Character Determinations, Part 5 Investigations and Reports, Volume VI Minerals. We have shown adequate quantity. Where the criteria call for 5,000 cubic yards we have shown 10,000 cubic yards for each sub-division of each claim.

The Board adopted questested finding No. 1, demand for gravel (A-96), No. 5, quantity of gravel (A-97), No. 6, quality of the gravel (A-97), No. 7, extent of the washed gravel south of Stuart's Fork on the contested claims (A-97-98), No. 10, existence of a local market for 100,000 to 150,000 tons of gravel per year (A-98), No. 12, continuity of local market for gravel since 1850 in Trinity County (A-99), No. 14, only one competitor for local market (A-99), Nos 17 and 76, good accessibility (A-100, 121), No. 19, the extent of market study made by James R. Miller, Commodity expert (A-101), No. 79, yardsticks for measuring mineral demand (A-121), No. 81, scarcity of gravel (A-122).

Although the government engineers testified that there are 10,000 cubic yards of fine, washed gravel on each ten-acre subdivision of each contested claim, (Tr 623, 646, Erich; Tr 250, Evans; Tr 344, Middleton), Humboldt's requested finding No. 48 was rejected. (A-108).

Mr. Evans testified that loose gravel could be handled for about 25 cents per

ton. (Tr 274).

When Mr. Erich was shown contracts between Bleak Brothers Sand and Rock and Peter Kiewitt & Son, an order for 35,000 tons of coarse aggregate $2.90 per ton, and an order for 18,000 tons fine aggregate for concrete pavement $2.90 per ton f.o.b. carrier site, Mr. Erich testified that local people will pay a higher price but if the material is processed and crushed, the average price was $1.80 to $1.90 per ton. (Tr 617).

There is a suitable profit spread between handling and processing costs and the sales price. (Tr 719, Miller)

There are diggings on the contested claims where rock had been taken off the claims for gravel. Stuart's Fork is a big mass of gravel. It is washed and can be used very easily. (Tr 621, Erich) Yet, requested findings Nos. 82, A-122 and No. 2, A-96 were rejected.

The Act of July 23, 1955, 30 USC 611 had no application to locations for valuable minerals made previously as here.

A landmark case of the Department, Layman et al v. Ellis, 52 L.D. 714 (1929) states at page 718:

> 'Data are presented contained in publications of the Geological Survey, entitled 'Mineral Resources of the United States,' as evidence of the marked increase in production, use, and price of this commodity since

> 1909, when the decision in the Zimmerman case was rendered. Supplementing the data presented by the commissioner, this series of publications show that in 1909 there was sold and used in the United States, 23,382,904 tons of gravel of all kinds of the value of $5,719,886, of which amount California produced 914,035 tons, valued at $169,476 (1910, Part 2, p. 602); that in 1927 the combined tonnage of building, paving and railroad ballast gravel used and sold in the United States was 103,865,930 tons, valued at $51,238,388. Of this amount California produced 2,460,072 tons of paving gravel alone of the value of $1,177,086 (1927, Part 2, p. 160-181.)
>
> The commissioner's statement also appears to be correct that 'according to these tables in 1927, California produced over seven times the amount it did in 1909, the value of the 1927 production being over 26 times the value in 1909.' The tables for the year 1927 also show an average value throughout the United States of all gravel sold of 67 cents per ton. A noteworthy feature in recent years is the growth of the size and number of large plants producing washed or otherwise cleaned gravel and crushed stone of standardized grading and size, bringing about keen competition between gravel and crushed stone for wide market areas in contrast to the strictly local market of a few years ago, this competition (is) developing controversies

and discussions as to zone and commodity freight rates. (1925, Mineral Resources, Part I, p. 47). In these publications gravel and sand have uniformly been classed as a mineral resource. They are also included in the list of useful minerals (U.S.Geological Survey Bulletins Nos. 585, 910) and mineral supplies (U.S. Geological Survey Bulletin No. 666).

'From what has been stated there can be no question that gravel deposits are definitely classified as a mineral product in trade and commerce and have a pronounced and widespread economic value because of the demand therefor in trade, manufacture, or in the mechanical arts."

CONCLUSION

Therefore, there was a substantial controversy about the facts, shown by the administrative record. This precludes entry of a Rule 56 F.R.C.P. summary judgment.

The ultimate conclusion was not supported by the basic facts. Apparent from the record, the district court made no review, or at least made no findings as to the substantiality of the evidence, necessary for appellate review.

The Court of Appeals should have remanded the case for findings on the substantiality of the evidence, if any, to support the ultimate bald conclusion.

We pray that this Honorable Court issue a writ of certiorari to the Court of Appeals for the Ninth Circuit.

June 22, 1977.

Respectfully submitted,

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